GIBSON DUNN

March 2, 2020

CFTC ISSUES PROPOSED RULE ON SPECULATIVE POSITION LIMITS ON DERIVATIVES

To Our Clients and Friends:

On January 30, 2020, the Commodity Futures Trading Commission ("CFTC" or "Commission") approved on a party-line, 3-2 vote,[1] a proposed rule on federal speculative position limits for derivatives (the "2020 Proposal"),[2] to conform to the amendments to the Commodity Exchange Act ("CEA") resulting from the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[3] The 2020 Proposal would establish federal speculative position limits on 25 physically-settled commodity derivatives and their linked cash-settled futures, options on futures, and economically equivalent swaps. In connection with setting the federal position limits, the 2020 Proposal would also establish exemptions from such position limits for certain transactions that qualify as bona fide hedges. Comments on the 2020 Proposal, which asks a number of specific questions, are due by April 29, 2020. The expectation is that this deadline will not be extended, as CFTC Chairman Tarbert has expressed his desire to finalize position limits this year.[4]

The 2020 Proposal marks the fifth time over the past decade that the CFTC has proposed rules to implement the position limits provisions resulting from the Dodd-Frank Act's amendments to the CEA. The CFTC initially issued proposed and final rules on speculative position limits in 2011;[5] however, the 2011 Final Rule was vacated by the U.S. District Court for the District of Columbia in 2012.[6] Following the vacatur of the 2011 Final Rule, the CFTC issued three additional proposed rules regarding speculative position limits in December 2013, June 2016 and December 2016, none of which were ever finalized.[7]

This client alert provides a brief overview of the differences between the 2020 Proposal and prior proposals; a summary of the 2020 Proposal; and insights regarding the 2020 Proposal and its potential impacts.

I. Differences from Prior Proposed Rules

In issuing the 2020 Proposal, the CFTC's interpretation of Section 737(a)(4) of the Dodd-Frank Act[8] differs from prior proposals in that the CFTC interprets the section to require a finding, before establishing a position limit, that such limit is "necessary" to "diminish, eliminate, or prevent" excessive speculation.[9] The 2020 Proposal notes that the U.S. District Court for the District of Columbia in *ISDA* identifies that the statutory language allowing the CFTC to regulate excessive speculation is subject to multiple interpretations and is ultimately ambiguous as to whether the CFTC must determine that a position limit is necessary prior to establishing the limit.[10] Rather than providing a definitive statutory interpretation, the court in *ISDA* directed the CFTC to use its "experience and expertise" to determine whether a necessity finding is required before the CFTC establishes a position limit.[11]

Following *ISDA*, the CFTC's position, as evidenced by the 2013 and 2016 proposals, was that the standards set forth in CEA Section 4a(a)(1)[12] do not require that it make a particular necessity finding. Moreover, in the 2013 and 2016 proposals, the Commission found that Section 737 of the Dodd-Frank Act required that it impose position limits on "all markets in physical commodities."[13] Accordingly, the 2020 Proposal differs from prior proposals by reading CEA Section 4a(a)(1) to place the burden on the government to determine what position limits are necessary.[14]

The 2020 Proposal seeks to impose speculative position limits on 25 core referenced futures contracts for which it has made a necessity finding.[15] Note, however, that position limits on contracts listed on exchanges (*i.e.*, designated contract markets) would continue to apply at the specific exchanges beyond the 25 required federal limits to the extent specified in the particular exchange rulebooks.

Unlike prior proposals, there is no express intent in the 2020 Proposal to expand position limits beyond the 25 core referenced futures contracts to include all commodities at a future date. Any position limits for a new commodity would have to proceed under a similar necessity finding and notice and comment rulemaking. Chairman Tarbert has described this approach to the necessity finding for position limits as a "big picture approach."[16] Chairman Tarbert explained that the approach takes into account the fact that position limits impose a burden, whether "on parties having to track their positions relative to limits, or potentially the loss of a business opportunity because the risks cannot be hedged" and as such seeks to impose these limits only when necessary.[17]

II. Contracts Subject to Position Limits

A. Federal Spot Month Position Limits Would Apply to 25 Core Referenced Futures Contracts (and Linked/Equivalent Contracts)

1. 25 Core Referenced Futures Contracts

The 2020 Proposal establishes position limits on 25 core referenced futures contracts (which are physically-settled futures derivatives contracts) and their linked cash-settled futures, options on futures, and economically equivalent swaps (collectively, the "Referenced Contracts"). Nine of the proposed 25 core referenced futures contracts are currently subject to federal speculative position limits under Part 150 of the CFTC's regulations. Those nine legacy agricultural contracts are: (1) CBOT Corn; (2) CBOT Oats; (3) CBOT Soybeans; (4) CBOT Wheat; (5) CBOT Soybean Oil; (6) CBOT Soybean Meal; (7) MGEX Hard Red Spring Wheat; (8) ICE Cotton No. 2; and (9) CBOT KC Hard Red Winter Wheat.

Of the remaining 16 core referenced futures contracts, seven are agricultural contracts, five are metals contracts, and four are energy contracts. These commodities may appear familiar to those that have followed the CFTC's actions around federal position limits, as they are the same commodities listed in the CFTC's 2016 position limits proposals. Those futures contracts are: (1) CME Live Cattle; (2) CBOT Rough Rice; (3) ICE Cocoa; (4) ICE Coffee C; (5) ICE FCOJ-A; (6) ICE U.S. Sugar No. 11; (7) ICE U.S. Sugar No. 16; (8) COMEX Gold; (9) COMEX Silver; (10) COMEX Copper; (11) NYMEX Platinum; (12) NYMEX Palladium; (13) NYMEX Henry Hub Natural Gas; (14) NYMEX Light Sweet Crude Oil; (15) NYMEX New York Harbor ULSD Heating Oil; and (16) NYMEX New York Harbor RBOB Gasoline. Position limit levels are intended to be low enough to protect excessive speculation

and price discovery; high enough to ensure sufficient liquidity for bona fide hedgers; within a range of acceptable levels; and to account for differences between markets. The limits set forth in the 2020 Proposal apply to all Referenced Contracts, not only to core referenced futures contracts, such that linked cash-settled futures and options on futures, as well as economically equivalent swaps would need to be aggregated when calculating. Notably, while the definition of Referenced Contracts would include linked contracts (discussed below), the definition would not include: (1) location basis contracts; (2) commodity index contracts; (3) swap guarantees; and (4) trade options that meet the requirements of CFTC Regulation 32.3.[18]

2. Cash-Settled Futures and Options on Futures

The 2020 Proposal's definition of Referenced Contract would incorporate cash-settled look-alike futures contracts and related options that are either "(i) directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of that particular core referenced futures contract; or (ii) directly or indirectly linked, including being partially or fully settled on, or priced at a fixed differential to, the price of the same commodity underlying that particular core referenced futures contract for delivery at the same location or locations as specified in that particular core referenced futures contract."[19]

As a result, under the 2020 Proposal federal position limits would apply to all cash-settled futures and options on futures contracts on physical commodities that are linked, whether directly or indirectly, to a physically-settled contract subject to federal position limits. The CFTC views such cash-settled contracts as "generally economically equivalent to physical-delivery contracts in the same commodity" and notes that without federal position limits "in both the physically-delivered and cash-settled contracts [a trader] may have increased ability and incentive to manipulate one contract to the benefit of the other."[20] It should be noted that there are separate federal spot month position limits for physically-delivered Referenced Contracts compared to cash-settled Referenced Contracts, meaning that during the spot month, such physically-delivered Referenced Contracts are not able to be netted against cash-settled Referenced Contracts.[21]

The CFTC notes that it proposes to publish a *CFTC Staff Workbook of Commodity Derivative Contracts under Regulations Regarding Position Limits for Derivatives* ("CFTC Staff Workbook") in connection with the 2020 Proposal. The CFTC Staff Workbook would "provide a non-exhaustive list of Referenced Contracts" and would help market participants determine categories of contracts that would fit within the Referenced Contract definition.[22]

3. Economically Equivalent Swaps

The 2020 Proposal provides for a new definition for economically equivalent swaps, which will be defined as "swaps with 'identical material' contractual specifications, terms, and conditions to a referenced contract."[23] This definition of "economically equivalent swap" is narrower than the definition set forth in the CFTC's 2016 proposals, meaning that fewer swaps would be subject to federal speculative position limits under the 2020 Proposal than the prior proposals. Swaps in commodities other than natural gas that have identical contractual terms but differences in lot size specifications, notional

amounts, or delivery dates diverging by less than one day would be economically equivalent swaps; for natural gas contracts, similar contracts with a two day window would still be determined to be economically equivalent swaps.[24]

Such economically-equivalent swaps could be netted against other Referenced Contracts in the commodity for the purpose of determining one's aggregate positions for federal position limits.

4. Setting and Calculating of Spot Month Limits

The spot month limits apply to all of the Referenced Contracts. Position limit levels are set at or below 25 percent of deliverable supply, as estimated using recent data supplied by the designated contract market listing the core referenced futures contracts (and as verified by the CFTC). The 25 percent threshold is intended to make it difficult for a participant to corner the market, as "any potential economic gains resulting from the manipulation" of such a percentage ownership "may be insufficient to justify the potential costs, including the costs of acquiring, and ultimate offloading, the positions used to effectuate the manipulation."[25] This limits the potential for a market participant to use the Referenced Contracts to affect the price of the commodity. The Commission further expects that the 25 percent limit level will not result in a reduction in liquidity for bona fide hedgers in the identified markets. Finally, the Commission cites as a reason for its choice of the 25 percent threshold the fact that that threshold is customarily used by some of the exchanges.[26]

The position limits apply separately to physically-settled and cash-settled contracts, meaning that a market participant may not net cash-settled Referenced Contracts against physically-settled Referenced Contracts. Rather, all of a participant's positions in a physically-settled Referenced Contract, across all exchanges, are netted and subject to the relevant limit, whereas all of a market participant's positions in cash-settled contracts linked to physically-settled core referenced futures contracts are netted and independently subject to the federal spot month limit for a given commodity.[27] The Commission disallowed netting out of a concern that allowing netting could disrupt "the price discovery function" of the core referenced futures contract or "allow a market participant to manipulate the price of" a core referenced futures contract.[28]

The 25 percent deliverable supply based limits are roughly twice as high as existing federal limits. Some have argued that, without a transition period and analysis on how the market will react to these new limits, market disruption may be likely. In his dissent, Commissioner Berkovitz specifically notes that distributing these limits across non-spot months could lessen the potential to disrupt the convergence process and disrupt market signals that large speculative trading may pose.[29]

The proposed spot month limits for Referenced Contracts are set forth in Annex A to this alert.

B. Federal Non-Spot Month Position Limits Would Only Apply to the Nine Legacy Core Referenced Futures Contracts (and Linked/Equivalent Contracts)

The 2020 Proposal also applies position limits outside of the spot month, referred to as the "non-spot month," to Referenced Contracts based on the nine legacy agricultural commodities currently subject to

federal position limits. The remaining 16 Referenced Contracts do not have non-spot month position limits, other than the exchange-set limits and/or position accountability levels.

The non-spot month limits are set at 10 percent of open interest for the first 25,000 contracts of open interest, with a marginal increase of 2.5 percent of open interest above 50,000 contracts thereafter. These non-spot limits have been in place for decades, and the Commission believes their removal could result in market disruption. Market participants trading in these contracts requested the Commission maintain the non-spot month limits to promote "market integrity."[30] While the 2020 Proposal updates these limit levels, as they had not been updated in over a decade, the Commission's methodology for setting these limits has not changed, except that the 2.5 percent of open interest will be applied above 50,000 contracts, rather than the current level of 20,000 contracts.[31] The Commission explains that this change is meant to accommodate the near doubling of open interest in these markets.

While the Commission proposed federal non-spot month limits only for the nine legacy contracts, the Commission also requires the exchanges to establish "exchange-set position limits and/or position accountability levels in the non-spot months" for the remaining core referenced futures contracts, "consistent with Commission standards set forth in [the 2020 Proposal]."[32] Accordingly, market participants would need to continue to monitor the exchange position limits going forward, as they may be different from the federal position limits set forth in the 2020 Proposal.

The proposed non-spot month limits for the nine legacy agricultural contracts are set forth in Annex A to this alert.

C. Exemptions from Federal Position Limits

The 2020 Proposal establishes exemptions from the federal position limits for certain bona fide hedging transactions. The Commission proposes a new definition of bona fide hedges that market participants wishing to request an exemption from position limits must meet. As a corollary to the revised definition, the Commission also lists certain enumerated hedges that are examples of bona fide hedges in Appendix A to Part 150; contracts that qualify as an enumerated hedge are self-effectuating and do not require Commission approval. However, and as explained further below, market participants must still submit applications for exemptions from exchange-set position limits for these contracts, as applicable.

1. Enumerated Hedges

Positions in Referenced Contracts that meet any of the enumerated hedges that are listed in Appendix A to proposed Part 150 would meet the bona fide hedging definition set forth in CEA Section 4a(c)(2)(A) and the proposed definition of bona fide hedging set forth in the 2020 Proposal. Below is a list of the enumerated hedges set forth in the 2020 Proposal:

1. Hedges of unsold anticipated production;
2. Hedges of offsetting unfixed-price cash commodity sales and purchases;
3. Hedges of anticipated mineral royalties;

4. Hedges of anticipated services;
5. Cross-commodity hedges;
6. Hedges of inventory and cash commodity fixed-price purchase contacts;
7. Hedges of cash commodity fixed-price sales contracts;
8. Hedges by agents;
9. Offsets of commodity trade options;
10. Hedges of unfilled anticipated requirements;
11. Hedges of anticipated merchandising.

The CFTC provides specific guidance around these enumerated hedges in proposed Appendix A to Part 150 and in the preamble to the 2020 Proposal. Exemptions for positions that qualify as enumerated hedges are self-effectuating for purposes of federal position limits, provided that the market participant complies with exchange requirements by requesting an exemption from exchange-set position limits.[33]

2. Non-Enumerated Hedges

The 2020 Proposal's definition of bona fide hedge would require that the position (1) represents a substitute for transactions made at a later time in a physical marketing channel; (2) is economically appropriate to the reduction of price risks in the conduct of a commercial enterprise; and (3) arises from the potential change in value of actual or anticipated (A) assets, (B) liabilities or (C) services a person provides or purchases.[34] Alternatively, a position may qualify as a bona fide hedge where it is a pass-through swap and pass-through swap offset pair, where the pass-through swap offset is a futures, option on a futures, or swap position entered into by the pass-through swap counterparty in the same physical commodity as the pass-through swap, or where the futures, option on futures, or swap position reduces price risks attendant to a previously-entered-into swap position.[35] The 2020 Proposal would require that bona fide hedging transactions or positions in commodities must *always* (and not just *normally*) be connected to the production, sale, or use of a physical cash-market commodity.[36]

Market participants may request approval for an exemption to the federal position limits for bona fide hedges that are not listed in the enumerated list in proposed Appendix A to Part 150 by demonstrating that they meet the definition of a bona fide hedge. Unlike the enumerated exemptions, these exemptions are not self-effectuating and the 2020 Proposal would require a market participant to request the non-enumerated hedge in one of two ways: (1) apply directly to the Commission (and also to the exchange) or (2) use a new streamlined process by requesting only through the exchange.

Under the new proposed streamlined process for requesting a bona fide hedge exemption set forth in the 2020 Proposal, a market participant may request an exemption from federal and exchange-level position limits by filing a single application to an exchange, pursuant to the exchange rules. This proposed

streamlined process delegates the initial authority for approving an application for a non-enumerated hedge to the exchange, where the exchange maintains Commission-approved standards for such applications; if an exchange authorizes a non-enumerated hedge for a market participant, it must notify the CFTC of its determination. Upon notice of the exchange's authorization of such an application, the CFTC will have a 10-day review period (or two days where sudden or unforeseen needs exist) during which it can object to such authorization. So long as the Commission does not object to the exchange determination, the request is deemed approved upon expiration of such 10-day period. The 2020 Proposal asks whether this 10 day (or two day) period may be too short (or too long). Commissioner Stump noted in her statement that the "10/2-day rule" is impracticable, in that it is too long from a market participant's perspective to make hedging decisions quickly, and too short a time period for the Commission to determine whether the position is a bona fide hedge. Commissioner Stump expressed a preference that non-enumerated hedges be approved at the exchange level, given their familiarity with the hedging practices in their markets.[37] The 2020 Proposal outlines what must be included in the market participant's application to an exchange for recognition of an exemption.[38]

While the 2020 Proposal does not dictate timelines for exchanges to review exemption applications that are submitted by market participants, it does provide that an exchange may adopt rules to allow a market participant to submit for approval a bona fide hedging application within five days after federal position limits are exceeded, if such market participant exceeds the limits due to sudden or unforeseen circumstances and can provide materials to demonstrate such circumstances.[39] The Commission notes that applications submitted after a person exceeds the federal speculative limit should not be habitual and that if it were to find that the position does not qualify as a bona fide hedge, the applicant would need to bring its position into compliance within a commercially reasonable time.

3. Risk Management Exemption Removed

This revised definition removes the risk management exemption, which had enabled market participants to treat a position entered into for "risk management purposes" as a bona fide hedge, unless the position otherwise satisfies the requirements of the pass-through provisions for a pass-through swap.[40] This is because the proposal modified the "temporary substitute test" to require that a bona fide hedging transaction or position in a physical commodity must "always," and not "normally," be connected to the production, sale, or use of a "physical cash-market commodity."

4. Carve Outs Contained in CFTC Regulation 150.3

Other exemptions from federal position limits include certain spread positions (such as calendar spreads and energy crack processing spreads),[41] certain financial distress positions, certain natural gas positions held during the spot month, and pre-Dodd-Frank enactment and transition period swaps. These exemptions, however, are listed in proposed CFTC Regulation 150.3, and not proposed Appendix A to Part 150.

D. Exemptions from Exchange-Level Position Limits and Certain Reporting Requirements

In addition to the federal position limits, market participants will remain responsible for complying with all exchange-level position limits for products listed on a particular exchange and must apply for exemptions from such exchange-level limits for both enumerated and non-enumerated hedges in accordance with the exchange rules.

While the list of enumerated hedges in Appendix A to Part 150 is self-effectuating for federal purposes, the market participant will still be required to follow exchange rules to claim the exemption. For example, in CME Rulebook Rule 559 "[a] person seeking an exemption from position limits must apply to the Market Regulation Department on forms provided by the Exchange."[42] Those requirements will remain in effect even after a final federal position limits rule is implemented.

In addition, the 2020 Proposal will eliminate certain reporting requirements, including removing the reporting obligations associated with Form 204[43] and Parts I and II of Form 304.[44] Instead of requiring these forms to be submitted, the CFTC will instead rely upon the cash positions report from the exchanges. This new system will place a greater focus on the data reported to exchanges. For example, under the 2020 Proposal, an energy trader that trades NYMEX natural gas and also the look-alike contract on ICE would have to report his/her cash positions to both exchanges (including equivalent cash positions). This outcome may prove to be more burdensome for market participants than submitting a single report to the CFTC.

E. Aggregation and Netting

Under CFTC Regulation 150.4, which was amended in 2016 by the CFTC's Final Rule on Aggregation, positions a person holds must be aggregated with positions for which the person controls trading or holds a ten percent or greater ownership interest.[45] Long positions across exchanges and short positions across exchanges must be netted, and that net value is subject to federal position limits. A person that holds more than one account or pool with substantially identical trading strategies must aggregate all such positions with all other positions held by that person and their affiliates. Economically equivalent swaps must be added to, and netted against, other Referenced Contracts in the same commodity for the purpose of determining the aggregate position. The 2020 Proposal also provides a new definition of "Eligible Affiliates" that would make clear that an eligible affiliate may aggregate its positions even though it is eligible to disaggregate positions.[46] Several exemptions to the requirement to aggregate are contained in the existing rule, including for futures commission merchants and certain independent trading strategies, among others.

As discussed above, positions in physically-settled contracts may not be netted with positions in linked cash-settled contracts when calculating for position limits. This means that (1) all of a trader's long and short positions in a particular physically-settled Referenced Contract (executed across all exchanges and OTC, as applicable) are netted and (2) all of a trader's long and short positions in any cash-settled Referenced Contracts (executed across all exchanges and OTC, as applicable) linked to such physically-settled core referenced futures contract are netted independently (rather than collectively along with the

physically settled positions) subject to the federal spot month limit for that commodity.[47] Non-Referenced Contracts cannot be used to net against Referenced Contracts.

ANNEX A

Below are the nine "legacy" contracts along with the 2020 Proposal's spot month and non-spot-month limits for those contracts:

Legacy Agricultural Contracts	2020 Proposal's Spot Month Limit	2020 Proposal's Single Month and All-Months Combined Limit
CBOT Corn (C)	1,200	57,800
CBOT Oats (O)	600	2,000
CBOT Soybeans (S)	1,200	27,300
CBOT Wheat (W)	1,200	16,900
CBOT Soybean Oil (SO)	1,100	17,400
CBOT Soybean Meal (SM)	1,500	19,300
MGEX Hard Red Spring Wheat (MWE)	1,200	12,000
ICE Cotton No. 2 (CT)	1,800	12,000
CBOT KC Hard Red Winter Wheat (KW)	1,200	11,900

Below are the additional 16 core referenced futures contracts and the proposed spot month limits set forth in the 2020 Proposal:

Agriculture	2020 Proposal	Metals	2020 Proposal	Energy	2020 Proposal
CBOT Rough Rice (RR)	800	COMEX Gold (GC)	6,000	NYMEX Henry Hub Natural Gas (NG)	2,000
ICE Cocoa (CC)	4,900	COMEX Silver (SI)	3,000	NYMEX Light Sweet Crude Oil (CL)	6,000/5,000/4,000[48]
ICE Coffee C (KC)	1,700	COMEX Copper (HG)	1,000	NYMEX New York Harbor ULSD Heating Oil (HO)	2,000
ICE FCOJ-A (OJ)	2,200	NYMEX Platinum (PL)	500	NYMEX New York Harbor RBOB Gasoline (RB)	2,000
ICE U.S. Sugar No. 11 (SB)	25,800	NYMEX Palladium (PA)	50		
ICE U.S. Sugar No. 16 (SF)	6,400				
CME Live Cattle (LC)	600/300/200[49]				

[1] CFTC Commissioners Dan Berkovitz and Rostin Behnam dissented.

[2] Position Limits for Derivatives, 85 Fed. Reg. 11,596 (Feb. 27, 2020).

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, § 737(a)(4), Pub. L. No. 111-203, 124 Stat. 1376, 1723 (July 21, 2010).

[4] Chris Clayton, "CFTC Chair Keeps Focus on Ag," Progressive Farmer (Nov. 18, 2019), *available at* https://www.dtnpf.com/agriculture/web/ag/news/business-inputs/article/2019/11/18/commission-preparing-release-new.

[5] *See* Position Limits for Derivatives, 76 Fed. Reg. 4752 (Jan. 26, 2011); Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626 (Nov. 18, 2011) (the "2011 Final Rule").

[6] *Int'l Swaps & Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n*, 887 F. Supp. 2d 259 (D.D.C. 2012) ("ISDA").

[7] *See* Position Limits for Derivatives, 78 Fed. Reg. 75,680 (Dec. 12, 2013); Position Limits for Derivatives; Certain Exemptions and Guidance, 81 Fed. Reg. 38,458 (June 13, 2016); Position Limits for Derivatives, 81 Fed. Reg. 96,704 (Dec. 30, 2016).

[8] 7 U.S.C. 6a(a)(2)(A).

[9] 7 U.S.C. 6a(a)(1).

[10] 887 F. Supp. 2d 259, 267 (D.D.C. 2012).

[11] *Id.* at 270.

[12] 7 U.S.C. § 6a(a)(1).

[13] 2020 Proposal at 11,665.

[14] Statement of Commissioner Tarbert, (Jan. 30, 2020), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement013020.

[15] In particular, with respect to the 25 core referenced futures contracts, the CFTC identified their particular importance "in the price discovery process for their respective underlying commodities"; that "physical delivery of the underlying commodity" is required; and that in certain instances "especially acute economic burdens . . . would raise from excessive speculation causing sudden or unreasonable fluctuations or unwanted changes in the price of the commodities underlying these contracts." 2020 Proposal at 11,603.

[16] Statement of Commissioner Tarbert (Jan. 30, 2020), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement013020.

[17] *Id.*

[18] *Id.* at 11,620-11,621. In the final trade options rule, the CFTC explained that federal position limits should not apply to trade options and that it would address trade options in the context of any final rulemaking for federal position limits. *See* Trade Options, 81 Fed. Reg. 14,971 (Mar. 21, 2016).

[19] 2020 Proposal at 11,615.

[20] 2020 Proposal at 11,620.

[21] *Id.* at 11,635-11,637.

[22] *Id.* at 11,621.

[23] *Id.* at 11,599.

[24] 2020 Proposal at 11,599.

[25] *Id.*at 11,626.

[26] *Id.*

[27] *Id.*at 11,636.

[28] *Id*.

[29] Dissenting Statement of Commissioner Berkovitz (Jan. 30, 2020), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement013020b.

[30] 2020 Proposal at 11,628.

[31] *Id.* at 11,630.

[32] *Id.* at 11,598.

[33] *Id.* at 11,601.

[34] *Id.* at 11,600. With respect to assets, the Commission notes that it would include "assets which a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising." *Id*. at 11,717.

[35] 2020 Proposal at 11,717.

[36] *Id.* at 11,601.

[37] Statement of Commissioner Stump (Jan. 30, 2020), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement013020.

[38] 2020 Proposal at 11,652.

[39] *Id.* at 11,653.

[40] *Id.* at 11,641.

[41] If a spread strategy is not covered under the definition of "spread transaction" in proposed CFTC Regulation 150.3, then a market participant would need to petition the CFTC for such spread exemption.

[42] *See* CME Rulebook, Section 559, *available at* https://www.cmegroup.com/content/dam/cmegroup/rulebook/CME/I/5/5.pdf.

[43] Form 204 is a monthly report of cash positions in grains, soybeans, soybean oil, and soybean meal.

[44] Form 304 is a statement of cash positions in cotton.

[45] 17 CFR § 150.4(a)(1); Aggregation of Positions: Final Rule, 81 Fed. Reg. 91,454 (Dec. 16, 2016).

[46] 2020 Proposal at 11,636. Under the proposed definition, an "eligible affiliate" includes certain entities that, among other things, are required to aggregate their positions under CFTC Regulation 150.4 and that do not claim an exemption from aggregation.

[47] *Id.* at 11,635-11,636.

[48] The proposed spot month limit for Light Sweet Crude Oil is subject to a step-down limit: (1) for contracts as of the close of trading three business days prior to the last trading day of the contract; (2) for contracts as of the close of trading two business days prior to the last trading day of the contract; and (3) for contracts as of the close of trading one business day prior to the last trading day of the contract. 2020 Proposal at 11,599.

[49] The Live Cattle federal spot month limit is subject to a step-down (1) at the close of trading on the first business day following the first Friday of the contract month; (2) at the close of trading on the business day prior to the last five trading days of the contract month; and (3) at the close of trading on the business day prior to the last two trading days of the contract month. 2020 Proposal at 11,599.

The following Gibson Dunn lawyers assisted in preparing this client update: Jeffrey Steiner, Jennifer Mansh and Chelsea Gunter.

GIBSON DUNN

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Financial Institutions, Derivatives or Energy, Regulation and Litigation practice groups, or any of the following:

Financial Institutions / Derivatives Groups:

Matthew L. Biben - New York (+1 212-351-6300, mbiben@gibsondunn.com)
Michael D. Bopp - Washington, D.C. (+1 202-955-8256, mbopp@gibsondunn.com)
Stephanie Brooker - Washington, D.C. (+1 202-887-3502, sbrooker@gibsondunn.com)
Arthur S. Long - New York (+1 212-351-2426, along@gibsondunn.com)
Jeffrey L. Steiner - Washington, D.C. (+1 202-887-3632, jsteiner@gibsondunn.com)

Energy, Regulation and Litigation Group:

William S. Scherman - Washington, D.C. (+1 202-887-3510, wscherman@gibsondunn.com)
Jeffrey M. Jakubiak - New York (+1 212-351-2498, jjakubiak@gibsondunn.com)

© 2020 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.